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ALEXANDER L. STEVAS,
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No. 83-529

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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1. The court of appeals' initial decision reversing respondents' convictions and suppressing the marijuana seized from the pickup truck rested on two grounds, each independently sufficient to support the judgment. The court ruled (1) that the discovery of the marijuana was the fruit of unlawful detentions of respondents, and (2) that the warrantless search of the marijuana bales was unlawful. Thereafter, this Court granted certiorari, vacated the court of appeals' judgment, and remanded the case to that court for further consideration in light of *United States* v. *Ross*, 456 U.S. 798 (1982). Respondents argue (Br. in Opp. 9-10) that, because *Ross* is relevant only to the warrantless search issue, the remand order must be read as an implicit affirmance of the court of appeals' decision on the detention and fruits issues. It therefore follows, according to respondents, that our attempt to obtain review of those issues by way of the present petition for certiorari is barred by the "law of the

case" doctrine. This argument is frivolous. If the Court had indeed determined the merits of the present issues in respondents' favor, it would have been entirely pointless to have granted the petition and remanded the case.[1]

2. Respondents contend (Br. in Opp. 10) that the court of appeals' ruling on the detention issue turned not merely on the duration of the detentions, but also on the fact that respondents were not free to leave, a fact that, respondents suggest, transformed their detentions into traditional arrests requiring probable cause.

However, an investigative stop regulated by the Fourth Amendment by definition involves the suspect's involuntary detention by police. In *Terry* v. *Ohio,* 392 U.S. 1 (1968), the Court recognized the principle that certain police conduct may constitute a "seizure" under the Fourth Amendment yet not require probable cause. The Court left no doubt that such a "seizure" involves some restraint on the freedom of the individual to walk away. *Id.* at 16. See *United States* v. *Place,* No. 81-1617 (June 20, 1983), slip op. 6. Indeed, as this Court has recently observed, when an individual is free to leave an encounter with a police officer, that encounter is not a "seizure" that implicates the protections of the Fourth Amendment at all. See *Florida* v. *Royer,* No. 80-2146 (Mar. 23, 1983), slip op. 5-6 (plurality opinion); *id.* at 3-4 (Brennan, J., concurring); *id.* at 2 (Blackmun, J., dissenting); *id.* at 5 n.3 (Rehnquist, J., dissenting); *United States* v. *Mendenhall,* 446 U.S. 544, 552-555 (1980) (opinion of Stewart, J.).

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[1]In his dissent on remand, Judge Russell drew precisely the opposite conclusion, *i.e.*, that the Court's remand made sense only if it implicitly decided the detention issue in the government's favor (Pet. App. 5a-13a). While we do not press such a contention here, it is certainly far more logical than respondents' argument.

Thus, contrary to respondents' suggestion, the fact that an individual's freedom to leave during an investigative detention of limited duration may be restrained in the same manner as it would be if he were arrested does not imply that the detention requires probable cause. As one leading authority has stated:

> The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance * * *. A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in *Terry*) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

3 W. LaFave, *Search and Seizure* § 9.2, at 29-30 (1978).

In short, the fact that respondents' detention was involuntary did not transform the stops into arrests. Furthermore, because involuntariness is inherent in the concept of a forcible investigatory stop that is subject to the Fourth Amendment, the detainee's inability to leave cannot possibly be a factor to be taken into account in determining whether the detention amounted to an unlawful arrest. Thus, the dispositive question here is not whether respondents were free to leave (they clearly were not), but whether their seizure was reasonable under the Fourth Amendment. The court of appeals held that the seizure was unreasonable solely by virtue of its duration, without regard to any of the surrounding circumstances; the court chose to disregard even the fact that the length of detention is primarily attributable to respondents' own actions. It is our submission

that this was error because, as this Court's Fourth Amendment decisions confirm, the determination of the reasonableness of a particular law enforcement action requires a consideration of all the relevant circumstances. See, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981).

3. Respondents contend (Br. in Opp. 14) that the delay between the initial stops and the formal arrests is attributable to the officers' actions rather than to respondents' own evasive maneuvers when directed by Officer Thrasher to pull over. As Judge Russell stated in dissent, however (Pet. App. 31a), the "ploy by [respondent] Savage in the truck is the basic cause of the delay complained of by [respondents]; there is no evidence of any unnecessary delay on the part of the officers." These maneuvers were, alone, responsible for any time lapse resulting from Agent Cooke's efforts to conduct his investigation of both respondents at locations half a mile apart. Thus, contrary to respondents' contention, the length of the detention was not at all the result of the officers' actions. Instead, the officers' actions, including Agent Cooke's attempts to contact Officer Thrasher by radio and his awaiting the arrival of local police to maintain the status quo at the site of the first stop, were directly attributable to the fact that respondents were stopped at separate locations. Although the majority below found that the overall delay transformed the stops into unlawful arrests, it never even suggested that these actions or any of the other factors enumerated by respondents constituted unreasonable conduct.[2]

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[2]The other factors cited by respondents, Agent Cooke's 21 mile surveillance of their vehicles before stopping them and the alleged failure of the police to explain the reason for the stop, did not in any way contribute to extending the detention of respondents. The lengthy pre-stop surveillance served to assure a sufficient factual predicate for the stops; indeed, Agent Cooke made most of the observations that formed the basis of his suspicion after he had followed respondents'

4. Respondents complain (Br. in Opp. 16) that the government may not challenge Sharpe's "standing" to suppress the marijuana discovered in the pickup truck because it did not raise this "standing" argument in the lower courts. Respondents fail to perceive, however, that this "standing" argument is simply one element of our argument on the fruits issue. The fruits issue itself is properly presented in the petition because the court of appeals expressly addressed and decided it in holding that the marijuana had to be suppressed as a consequence of respondents' assertedly unlawful detentions (Pet. App. 21a-22a). Thus, this is not a case in which the issue presented was "neither raised before *nor considered by* the Court of Appeals * * *." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (emphasis added). Cf. *Jenkins* v. *Georgia*, 418 U.S. 153, 157 (1974); *Raley* v. *Ohio*, 360 U.S. 423, 436 (1959). Moreover, the "standing" element of our fruits argument is properly presented because the court of appeals did not specify whether suppression of the marijuana as to Sharpe was based on the assertedly unlawful detention of Sharpe or that of Savage; the arguments in our petition on the fruits issue merely canvass all of the possible bases for the court of appeals' erroneous holding.

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vehicles for some distance (I Tr. 45-50, 85). There is, of course, no constitutional right to be detained at the precise moment a legally sufficient basis for detention is established. See, *e.g.*, *United States* v. *Davis*, 646 F.2d 1298, 1302 (8th Cir.), cert. denied, 454 U.S. 868 (1981); see also *United States* v. *Lovasco*, 431 U.S. 783, 791 (1977); *United States* v. *Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring). Furthermore, while respondents were not expressly informed that they had been stopped because they were suspected of transporting marijuana, this was the only logical implication of Officer Thrasher's statement to Savage that Agent Cooke, whom Thrasher identified as a DEA agent, would be there shortly; of Agent Cooke's identification of himself to both respondents as a DEA agent; and of Cooke's statement to Savage that he believed there was marijuana in the truck (I Tr. 54, 57, 105, 148-149).

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1984

DOJ-1984-01